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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICI CURIAE SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

The Airline Industrial Relations Conference ("AIR Conference") and the Air Transport Association ("ATA") submit this brief as amici curiae in support of the petition for certiorari filed by Burlington Northern Railway Co. ("BN") on April 1, 1988.* This case presents two questions whose resolution will vitally affect the ability of AIR Conference's and ATA's member air carriers to safeguard the flying public against the dangers created by drug use among employees. BN has requested that this Court determine whether a rail or air carrier that has historically enforced a safety rule prohibiting drug and alcohol abuse can implement more effective detection measures without precipitating a "major dispute" subject to the lengthy dispute resolution procedures of the Railway Labor Act. BN also has asked the Court to decide whether the right to implement a drug testing program is an implied in law term of a collective bargaining agreement.

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* Lists of AIR Conference and ATA members are attached as an appendix to this brief. The parties herein have consented to the filing of the amici curiae brief. Copies of their consent letters have been filed with the clerk.

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THE INTEREST OF THE AMICI CURIAE

The AIR Conference and ATA have a substantial interest in the disposition of this petition for certiorari. AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers with respect to legislative, judicial and administrative matters in these areas in the airline indus-

try. ATA is the Washington-based trade and service association of United States air carriers, with responsibilities, among others, to coordinate safety and operational concerns of the member carriers.

This case raises issues of extraordinary concern to all of AIR Conference's and ATA's members. BN has petitioned the Court to review a Ninth Circuit decision holding that the railroad could not institute post-accident testing of employees for possible drug use until it engaged in negotiations with the union. Most air carriers have or are considering implementing a drug detection policy similar to the BN's policy. Past practice of the parties in the airline industry demonstrates that the carriers have always exercised the exclusive right to enforce drug detection policies.

The great public need for drug testing of airline employees is underscored by the actions of the federal government. The Federal Aviation Administration has instituted a rulemaking procedure on drug policies for air carriers, which proposes mandatory post-accident/incident testing of airline employees. 53 Fed. Reg. 8368-88 (1988). The carriers believe that their ability to enforce or implement post-accident testing policies is essential in discharging the obligation imposed upon them by the Federal Aviation Act to provide the "highest possible degree of safety" to the flying public. 49 U.S.C. §1421(b) (Supp. 1987).

AIR Conference and ATA wish to provide this Court with an industry-wide perspective on the issues raised by the petition. The instant brief will describe the vital need for effective carrier measures that will prevent the slightest degree of danger to the traveling public from drug use. The brief reviews current carrier drug control policies, and the origins of those policies outside the collective bargaining processes. AIR Conference and ATA present the industry's view as to why their obligation to preserve air

safety necessitates that the carriers retain the right to implement and utilize the most effective methods for detecting employee use of drugs. The following brief will illustrate that the issues Burlington Northern petitions this Court to resolve have continuing, vital importance to the air transportation industry.

STATEMENT

1. Air Safety and Problems of Employee Drug Use

Since the airline industry was economically deregulated in 1978, air traffic has increased dramatically. There were 1,478,591 more aircraft departures in 1986 than in 1977, and 178,167,000 more passengers flown.[1] The operational difficulties caused by this tremendous increase in traffic, and the burdens imposed upon airports and air traffic control capacities, have been well-publicized. To operate and maintain aircraft safely in this environment, airline employees must perform at peak mental alertness and physical capacity at all times. The increased flight schedules have caused a corresponding increase of nearly 120,000 in airline employment.[2] Each plane flown by an air carrier requires rotating crews utilizing approximately fifteen pilots and thirty-five flight attendants, and is serviced and maintained by numerous ground workers.

The increase in air traffic coincides with a growing national concern about drug abuse among transportation industry employees whose job performance affects passenger safety. The recent Trans Colorado Airlines crash, which killed nine people, shattered any illusions that drugs had

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[1] U.S. scheduled airlines had 4,936,519 scheduled departures in 1977 and 6,415,110 departures in 1986. The airlines carried 240,326,000 revenue passengers in 1977 and 418,493,000 passengers in 1986. Air Transport 1987, The Annual Report of the U.S. Scheduled Airline Industry ("ATA Report") at 1. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

[2] *Id.* at 12.

not infiltrated the airline workforce. Post-accident tests revealed that cocaine was present in the captain's blood. The recent Amtrak train collision, in which sixteen were killed and 170 were injured, illustrates the grievous consequences of errors in judgment caused by employee use of drugs or alcohol. A drug-related catastrophe in the airline industry can take a far greater toll than an accident in other forms of transportation. Air disasters have claimed as many as 581 lives in a single incident.

Carriers involved in such disasters are subject to staggering liabilities. In one case a jury awarded $7.9 million in compensatory damages to the estate of a corporate executive who was killed in a commercial plane crash.[3] Recent settlements have reached over $800,000.00 per passenger in cases in which there were claims of carrier negligence.[4] Carriers are justifiably concerned about the extensive damages which a jury can impose in crash-related litigation. Carriers that fail to conform to Federal Aviation Administration ("FAA") safety standards also can incur steep penalties and/or loss of their certifications.

2. The Federal Aviation Act Public Safety Mandate

In formulating all safety policies, including those relating to drug use, carriers are guided by the Federal Aviation Act public safety mandate. This mandate imposes upon carriers a duty to maintain public safety independent of the regulatory responsibilities of the FAA. The Federal Aviation Act provides that "the [FAA] Administrator shall give full consideration to the duty resting upon air carriers

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[3] A federal jury awarded $7.9 million to the estates of IBM executive Phillip Estridge and his wife who were killed in a 1985 Delta Airlines crash. *Wall Street Journal*, March 22, 1988 at 7.

[4] Settlements in the 1982 Air Florida crash at Washington, D.C. National Airport averaged over $800,000.00 per passenger.

to perform their services with the *highest possible degree of safety in the public interest. . . .*" 49 U.S.C. § 1421(b) (emphasis added).

Several circuits have recognized that this independent Congressional mandate justifies broad deference to air carrier safety measures. In upholding an age-forty cutoff for second officer applicants, the District of Columbia Circuit rejected an argument that the low probability of safety hazards was insufficient justification for the hardship to rejected individuals, reaffirming that a carrier must avert the slightest potential danger:

> As an air carrier with a public duty to operate with the highest degree of safety, [a carrier] is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the essence of [a carrier's] business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *quoting Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. CA. 1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980). *See also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, n.30 (5th Cir. 1976) (employers must be accorded great leeway and discretion in determining the manner in which they may operate safely).

In *Mulholland v. Department of the Army*, 660 F. Supp. 1565 (E.D.VA. 1987), the court sustained a drug test policy for employees holding aviation-related positions:

> Because of the sensitive nature of flight patterns and congestion around the Washington, D.C. area, mechanical reliability of these helicopters is crucial. The duties of aircraft mechanics and refuelers demand continuous concentration, alertness, exacting meas-

> urements, and attention to detail with minimal supervision. Considering the prevalence of drug usage in our society and the workplace, and the subtle and perilous present and after effects on the users' physical, mental and emotional states, it is not only acceptable but imperative that this random urine testing conducted under proper procedures be required for certain sensitive positioned employees such as plaintiffs who are responsible for numerous lives. Recent cases particularly have demonstrated that employees in dangerous and/or highly visible occupations, which involve the safety, well-being, and integrity of the public, are and should be held to a higher standard of care than other less conspicuous, non-safety related positions.

660 F. Supp. at 1570.

Under the Federal Aviation Act, carriers are responsible for the performance of their employees, such as pilots and mechanics. The FAA regulations require carriers to make "[p]roper evaluation of pilot performance including the detection of . . . [p]ersonal characteristics that could adversely affect safety." 14 C.F.R. §121.413(a)(4)(ii). The FAA regulations also prohibit service by a crew member while "using any drug that affects the person's faculties in any way contrary to safety." *Id.* §91.11(a)(3). This two-pronged air safety approach clearly dictates that carriers have and utilize the most effective methods for detecting drug usage by their employees.

3. Carrier Drug Detection Policies

To prevent drug-related disasters, all carriers have adopted drug detection programs for their employees. Most carriers have implemented employee assistance programs to enable workers to seek rehabilitation for drug problems. Most carriers offer reinstatement, generally with no loss of seniority, to an addicted employee who volunteers to enter

an EAP rehabilitation program before they are caught violating the prohibitions on drug use.

However, the carriers have found that many employees with drug or alcohol problems do not voluntarily come forward. Consequently, the airlines have had to implement testing procedures to detect recalcitrant abusers of drugs and alcohol. The first test occurs at the pre-employment phase, so that "high risk" candidates never enter the workforce. For pilots, there is periodic testing when they undergo regular medical checkups. Many employees must undergo drug testing as part of their physical examination after they have been on furlough or extended leave. Most airlines utilize reasonable cause/probable suspicion testing of workers. A majority of the carriers also require that employees submit to drug testing following an accident or incident, provided the affected workers were in a position to control or avert the accident.

These drug testing programs clearly can have a deterrent effect on drug users and potential users. *See Airline and Rail Service Protection Act of 1987: Hearing on S. 356 and S. 362 Before the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 1st Sess.21 (Feb. 20, 1987) (Statement of Hon. Elizabeth H. Dole, Secretary, Department of Transportation); S. Rep. No. 43, 100th Cong., 1st Sess.3 (1987). Several air carriers have found that the increased use of pre-employment drug testing has led to a steady decrease in the percentage of applicants who test positive.

The carriers have always implemented their drug control rules unilaterally. No carrier has ever established through collective bargaining its policy concerning the use of drugs by any group of its workers. Equally important, no carrier has ever negotiated concerning the types of testing or other methods of detection to be utilized to enforce the rules. The only subject related to drug control on which

some carriers historically have bargained is the company's agreement to establish an EAP.

4. FAA Rulemaking Proceedings on Drug Control

The FAA has begun a rulemaking proceeding on drug control policies for airline employees. In the FAA's recent Notice of Proposed Rulemaking ("NPRM") on Airline Drug Control, the agency has proposed mandatory post-accident testing. 53 Fed. Reg. 8368, 8386 (March 14, 1988) (to be codified at 14 C.F.R., Part 121) (Docket No. 25148). However, the final rules may not necessarily include this provision and are unlikely to be operational until late 1989. Further, given the Ninth Circuit's decision in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (March 17, 1988), it is uncertain that the FAA rules would survive a court challenge.[5] Thus the FAA rulemaking proceedings may not resolve the issues raised in this case, as they relate to the airline industry.

The comments of the FAA in the preamble to the NPRM demonstrates the public policy considerations which underlie the need for drug testing of airline employees with safety responsibilities:

> The F.A.A. in its regulatory role has no evidence to suggest that the aviation community differs significantly from the overall population in terms of drug abuse. The public expects, and is entitled to, a drug-free environment in those aviation activities that involve their personal safety. Allegations that certain air carrier crewmembers have used illegal drugs have raised questions about the overall degree of drug abuse in the industry and whether crewmembers are flying

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[5] The same Ninth Circuit majority that decided the instant case ruled in *RLEA v. Burnley* that mandatory drug testing under the Federal Railroad Administration regulations was an unconstitutional violation of the Fourth Amendment.

> after having used drugs, and thus jeopardizing the personal safety of passengers and others.

53 Fed. Reg. at 8369.

The presence of the post-accident testing provision in the NPRM underscores the safety need for such detection methodology. Under the proposed rule, employers would be required to obtain urine samples from "sensitive safety and security-related employees whose performance contributed to an accident." *Id.* at 8375. The FAA emphasizes the importance of testing "quickly so that the tests can be administered while evidence of drug use, if any, is still in the employee's system." *Id.* at 8376.

ATA, in its comments to the FAA on the Advance Notice of Proposed Rulemaking endorsed post-accident testing. Although most airline union commenters opposed any form of testing, it is notable that the Air Line Pilots Association ("ALPA"), the primary labor organization for commercial airline pilots, did not oppose post-accident testing, provided certain safeguards are incorporated.[6]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER CARRIERS CAN IMPLEMENT ENHANCED DRUG DETECTION PROCEDURES WITHOUT TRIGGERING THE "MAJOR DISPUTE" PROCEDURES OF THE RAILWAY LABOR ACT.

Under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), a court's power to grant injunctive relief depends on whether the controversy before it constitutes a "major" or "minor" dispute. A major dispute relates to disputes over changes in rates of pay, rules or working conditions,

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[6] "ALPA Airs Its Concerns," *The Air Line Pilot* at p. 31 (March, 1988). *See also* 53 Fed. Reg. at 8371.

while a minor dispute relates to the interpretation or application of existing agreements. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S 711, 722-24 (1945); *Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967).

The appropriate test in determining whether the admitted change is a "major" or "minor" change is whether the change is *arguably* justified by the parties' collective bargaining agreement. If the Court determines that the collective bargaining agreement reasonably affords some arguable basis for the change, the dispute is "minor" and the Court must then defer the interpretation of the contract to the arbitral tribunal (System/Adjustment Board).

> The key word in this test is "arguable." If the Court finds an arguable basis it must defer to the expertise of the Adjustment Board. . . . The true meaning . . . of the memorandum is the grist of arbitration.
>
> . . .
>
> . . . We again point out that controversy over such changes constitutes a minor dispute if provisions for settling such a dispute are arguably contained within the collective bargaining agreement.

REA Express Inc. v. Brotherhood of Railway, Airline and Steamship Clerks, 459 F.2d 226, 228 (5th Cir.), *cert. denied*, 409 U.S. 892. (1972). Further, because a "major" dispute can escalate into a strike, if there is any doubt as to whether a dispute is "major" or "minor," that doubt should be resolved in favor of finding a "minor" dispute. *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. Railway*, 768 F.2d 914, 920 (7th Cir. 1985).

As Petitioner has indicated, the Ninth Circuit's decision herein directly conflicts with the Eighth Circuit's decision in *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016 (8th Cir. 1986) ("BMWE"). There, the Eighth Circuit ruled that BN's im-

plementation of the *same* post-accident testing program at issue here constituted a "minor" dispute, to be resolved in arbitration.

In *BMWE*, the Eighth Circuit noted that the union in the past had voiced little objection to the railroad exercising its prerogative to remove from service an employee, where common-sense observation of that employee suggested that he/she was impaired. The Eighth Circuit found that since suspicion of impairment was still required, "the ground rules between the union and the railroad [had] not changed significantly . . ." 802 F.2d at 1023.

Conversely, the Ninth Circuit treated the post-accident testing program as a marked deviation from the prior ground rules between the parties: "BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and thus, by definition, a major dispute." 838 F.2d at 1039.

These opposing views have begun to spill over into the district courts. Federal courts in Texas and Pennsylvania have adopted Ninth Circuit reasoning and enjoined drug testing programs. *Transport Workers Union v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D.PA. 1988), *appeal docketed*, No. 88-1177 (3d Cir. Feb. 18, 1988) (random drug testing); *International Brotherhood of Teamsters v. Southwest*, No. CA3-86-3103-R (N.D.TX. 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (post-accident testing). In contrast, district courts in the District of Columbia and Washington State have ruled that drug testing constituted a "minor dispute." *International Association of Machinists v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987) (enhanced drug testing procedures); *Airline Pilots Association v. Alaska Airlines*, No. C87-353-R (W.D.WA. 1987), *appeal docketed*, No. 87-4167 (9th Cir. September 9, 1987) (medical examination and reasonable cause testing.)

This split among the circuit and district courts results from the failure of the Ninth Circuit and certain district courts to properly recognize their limited role in deciding "major" versus "minor" cases. As with other courts before it, the Ninth Circuit succumbed to the temptation to "interpret" the contract. The Ninth Circuit found that the implied contract/past practices of the parties could only be interpreted as permitting the carrier to utilize "non-intrusive" techniques for enforcing its drug and alcohol rules. But contract interpretation is the very job that Congress has delegated to arbitrators and has removed from the courts.

The Ninth Circuit's reading of the BN-BLE implied contract provision may in fact prove to be accurate. However, at this stage, that is irrelevant. It is not within the province of the court to determine which methods of detection the contract permits. That is for the arbitrator to decide. The only area of inquiry for the court is to determine whether the carrier's claimed contractual justification is "frivolous" or "obviously insubstantial." *Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen, supra.* Far from being "obviously insubstantial," the conclusion that past practices grant BN the latitude to implement refined techniques for detecting drug usage is compelled by the fact that rail and air carriers have traditionally kept enforcement of their drug and alcohol policies within their exclusive control.

The petition in this case adequately demonstrates the conflict among the circuits regarding the proper scope of the "major" versus "minor" distinction, and amici will not belabor the point. More important from AIR Conference's and ATA's perspective, however, is the effect that the split will have on carrier's ability to enforce drug use prohibitions. Most of the major air carriers operate in all twelve circuits. The airlines cannot cope with a scenario in which a pilot who creates a mishap while in Minneapolis can be tested, but not if the same incident occurs while

he is in Los Angeles. Nationwide uniformity in airline labor relations matters has been a longtime pillar of federal policy. The RLA has consistently been construed to provide for nationwide/system-wide crafts or classes. *International Brotherhood of Teamsters v. Texas International Airlines*, 717 F.2d 157 (5th Cir. 1983); *Air Cargo, Inc.*, 10 NMB 166 (1983). Likewise, the airline industry, with the exception of a few workers, is exempt from the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. §213(b)(3) (Supp. 1987). It is equally imperative that the law which governs carriers drug control policies be uniform nationwide.

II. THE NINTH CIRCUIT'S NOVEL APPLICATION OF THE FOURTH AMENDMENT TO PRIVATE EMPLOYERS ENDANGERS PUBLIC SAFETY.

Although acknowledging that BN "is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment," the Ninth Circuit effectively applies the constraints of the fourth amendment to the railroad. 838 F.2d at 1092. Referencing the fourth amendment, the court finds that "the focus of our inquiry—both under the fourth amendment and under an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing." *Id.* The court then proceeds to "decline to assume that BLE members granted BN the authority to invade their privacy in ways the government could not." 838 F.2d at 1093.

The Ninth Circuit's novel imposition of fourth amendment right of privacy concepts to a private employer is without judicial precedent. Equally important, the decision impedes the carrier's ability to maintain safety in the workplace. Finally, the decision is incompatible with the realities of the workplace of airline employees.

The principal reason for any drug and alcohol testing program in a public transportation setting is to identify unfit and potentially unfit employees so that public safety

is not adversely impacted. Drug and alcohol testing thus is an important part of an air carrier's public safety obligations. In view of the indisputable requirement that aircraft be operated in the safest possible manner, free from the potential catastrophes that can result from drug use by airline employees, no one can reasonably argue that drug testing policies, including post-accident testing, is not an essential part of its public safety obligations.

Contrary to the Ninth Circuit's implicit holding that mandatory drug testing necessarily violates an employee's right of privacy, federal courts have sustained drug testing policies in a number of safety related settings. For example in *Amalgamated Transit Union, Division 241 v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the court sustained, against constitutional challenge, a rule requiring bus drivers to submit to blood or urine tests following involvement in a serious accident or when they were suspected of being intoxicated or under the influence of narcotics. The court said:

> In this case, the CTA has a paramount interest in protecting the public by ensuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine test.
>
> . . . .
>
> Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse.

Id. at 1267.

In *National Treasury Employees Union v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879), the Fifth Circuit sustained a rule that required employees to undergo uri-

nalysis as a precondition to transfer to other positions. The Court relied in part on the safety-sensitive nature of some of the jobs:

> Finally, those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use. Like other public agencies, the Customs Service has a strong interest in ensuring that its employees operate effectively.

Id. at 178. *See also Mulholland v. Department of the Army, supra.* Notably, these three cases all involved government employees, to which the fourth amendment clearly applies.

Further, we would note that post-accident testing, which the Ninth Circuit disapproves of, is less subjective than the surveillance based testing, which the Ninth Circuit sanctioned. Post-accident testing is based on discrete, objective incidents—*i.e.*, an accident involving carrier equipment. The use of on-the-job accidents to trigger the testing requirement is manifestly fair because it limits testing to incidents that may be an indication of employee impairment and it eliminates subjectivity and supervisory discretion.

The Ninth Circuit apparently takes the position that there must be individualized suspicion, based upon "sensory surveillance," before drug testing is proper. Such a position is factually and scientifically unsound. As the Eighth Circuit found in *BMWE*, it is difficult to detect through visual observation whether an individual is impaired by drugs:

> The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clearheadness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that

> too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.

802 F.2d at 1020.

The claim that individualized suspicion should be required as a prerequisite to drug testing, was specifically rejected by the Fifth Circuit in *Von Raab*:

> It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens.

816 F.2d at 179. As in *Von Raab*, carriers should not be required to wait until it observes a staggering employee—or experiences a catastrophe—before it can test its pilots and other employees for drugs.

Scientific studies corroborate these judicial determinations that drug usage often does not produce outward manifestations, while still impairing employee performance. In Yesavage, *Carry Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142:11 Am. J. Psychiatry 1325 (November, 1985), the authors tested pilots on a simulator. They noted that "[a]t 24 hours [after marijuana ingestion], there were trends in all variables toward impaired performance." *Id.* at 1328. They further noted that "[o]ne of the pilots did land off the runway 24 hours after THC ingestion." *Id.* They concluded as follows:

> The current data, from an even more complicated test, indicate impaired performance 24 hours after smoking THC . . . These results suggest a need for concern about the performance of those en-

> trusted with complex behavioral and cognitive tasks within 24 hours after smoking marijuana. The subjects in this experiment were unaware of any affects on their performance, mood, alertness, etc. Some results may be applicable to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures.

Id.[7]

Finally, the Ninth Circuit's inference that drug testing invariably conflicts with transportation workers' expectations of privacy is without foundation. To the contrary, workers generally cannot even enter the airline industry without first undergoing mandatory drug testing. As previously noted, almost all U.S. carriers require pre-employment testing before they will hire a job applicant. Once on the job, pilots must undergo drug testing as part of their semi-annual physical examinations. Many airline workers must undergo drug testing as part of their physical examinations when they return to work after a furlough or prolonged leave. Likewise, reasonable suspicion and post-accident testing are already common practice at most U.S. carriers.

CONCLUSION

The import of this case revolves around one central theme—the right of the public to be safe and secure when they travel on our national transportation system, be it by plane, train or bus. If airlines and other transportation

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[7] *See also* Chaite, Fishman & Schuster, *Hangover Effects the Morning After Marijuana Smoking*, 15 Drug and Alcohol Dependence 229 (1985) (noting that "present results do suggest that marijuana smoking in the evening can result in measurable changes in behavior the next morning" and concluding that "even subtle changes in mood or behavior could have significant practical consequences for the many people who use marijuana believing that the drug will have no residual effects on the following day"). *Id.* at 236-37.

carriers retained employees who use illegal drugs, the integrity of their operations in the eyes of the public would be seriously compromised. To maintain public trust and satisfy their obligation under the Federal Aviation Act, air carriers have necessarily utilized drug testing, including post-accident testing. Airline unions and employees recognize that enforcement of drug policies, including the choice of detection methods, has traditionally been a subject of management prerogative, and outside the scope of the collective bargaining agreement. Under these circumstances, the Ninth Circuit's distorted reading of the "major versus minor" test and employees' right of privacy, cannot be sustained. The public interest in safe transportation must prevail.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX

ATA Members

Alaska Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Braniff, Inc.
Continental Airlines, Inc.
Delta Air Lines
DHL Airlines
Eastern Air Lines, Inc.
Evergreen International Airlines
Federal Express Corporation
The Flying Tiger Line, Inc.
Hawaiian Airlines
Midway Airlines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.
Southwest Airlines
Trans World Airlines, Inc.
United Airlines, Inc.
United Parcel Service
USAir, Inc.

Associate Members

Air Canada
Canadian Airlines International

AIR Conference Members

Airborne Express, Inc.
Alaska Airlines, Inc.
Aloha Airlines, Inc.
America West Airlines
American Airlines, Inc.
Braniff, Inc.
Continental Airlines, Inc.
Eastern Air Lines, Inc.
Federal Express Corporation
The Flying Tiger Line, Inc.
Midway Airlines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines
Reeve Aleutian Airways, Inc.
Tower Air
Trans World Airlines, Inc.
United Airlines, Inc.
United Parcel Service
USAir, Inc.
World Airways, Inc.